Supreme Court, U.S.
FILED
99T058 DEC 2 1 1999
OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

KEVIN JOHN KUEMMERLIN,

Petitioner,

v.

STATE OF NEVADA, DEPARTMENT OF MOTOR VEHICLES AND PUBLIC SAFETY,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Nevada

PETITION FOR WRIT OF CERTIORARI

JOHN GLENN WATKINS, ESQ.
Counsel of Record
804 S. Sixth Street
Las Vegas, Nevada 89101
(702) 383-1006

Attorney for the Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

18pp

QUESTION PRESENTED

Was Petitioner Kuemmerlin's due process rights under the Fourteenth Amendment of the United States Constitution violated when the Nevada Supreme Court held that a federal park ranger is also a state police officer and can enforce state law in a federal prosecution ignoring Congress' intent to the contrary?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 4

I. A FEDERAL PARK RANGER CANNOT ENFORCE STATE LAW IN A FEDERAL PROSECUTION 4

(a). The State of Nevada cannot unilaterally make a federal park ranger an agent of the State 5

(b). A federal park ranger is not a State police officer 7

CONCLUSION 9

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

Bell v. Burson, 404 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971) 4

Century Ready-Mix v. Campbell County, 816 P.2d 795 (Wyo. 1991) 6

General Building Contractor's v. Pennsylvania, et al., 458 U.S. 375, 102 S.Ct. 2141 (1982) 6

Grand Hotel Gift Shop v. Granite St. Ins., 108 Nev. 811, 839 P.2d 599 (1992) 6

Hand Realty Co. v. Meyers, 672 P.2d 583 (Kan. 1983) 6

Lewis v. United States, ___ U. S. ___, 118 S.Ct. 1135 (1998) 4

State, Dept. of Motor Vehicles v. Lovett, 110 Nev. 473, 874 P.2d 1247 (1994) 3, 4, 5, 6, 7, 8

Trump v. District Court, 109 Nev. 687, 857 P.2d 740 (1993) 5

United States v. Best, 573 F.2d 1095 (9th Cir. 1978) 5

United States v. Hollingshead, 616 F.Supp. 160 (D.C. Haw. 1995) 5

U.S. v. Love, 141 F.R.D. 315 (D. Colo. 1992) 3, 5

U.S. v. Rowe, 599 F.2d 1319 (4th Cir. 1979) 5

U.S. v. Snyder, 852 F.2d 471 (9th Cir. 1988) 5

CONSTITUTIONAL PROVISIONS

U.S. Constitution, Fourteenth Amendment 1

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND RULES

FEDERAL

18 U.S.C. § 13 4

18 U.S.C. § 3118 ..... 3, 9

28 U.S.C. § 257(3) 1

36 C.F.R. § 4.23 3

STATE

NRS 484.383(1) 2

NRS 484.118 7

LEGAL TREATISES AND ENCYCLOPEDIAS

American Jurisprudence, 2d Agency § 359 (1986) 6

PETITION FOR WRIT OF CERTIORARI

KEVIN JOHN KUEMMERLIN (KUEMMERLIN) respectfully prays that a Writ of Certiorari issue to Review the Judgment and Opinion of the Nevada Supreme Court entered in this proceeding October 20, 1999, in order to prevent the State Department of Motor Vehicles [DMV] from forfeiting KUEMMERLIN'S driver's license in violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

OPINIONS BELOW

The Decision of the Nevada Supreme Court that gives rise to the Petition is a published decision. It is reprinted in the Appendix ("App.") at pages App. 1-4.

JURISDICTION

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. 257(3). Certiorari is available for " . . . any right . . . claimed under the constitution. . . . "

CONSTITUTIONAL AND STATUTORY PROVISIONS

FOURTEENTH AMENDMENT:

> Section I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall

> make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Nevada Statutes:

> NRS 484.383(1)
>
> 1. Except as otherwise provided in subsections 3 and 4, any person who drives or is in actual physical control of a vehicle on a highway or on premises to which the public has access shall be deemed to have given his consent to an evidentiary test of his blood, urine, breath or other bodily substance for the purpose of determining the alcoholic content of his blood or breath or the presence of a controlled substance when such a test is administered at the direction of a police officer having reasonable grounds to believe that the person to be tested was driving or in actual physical control of a vehicle while under the influence of intoxicating liquor or a controlled substance.

STATEMENT OF THE CASE

On January 19, 1997, KEVIN JOHN KUEMMERLIN, hereinafter **KUEMMERLIN** was operating a motorcycle solely within the federal property known as the Lake Mead National Recreation Area [LMNRA] and was involved in an accident, in a curve, on one of the area's winding roads. A federal park ranger arrived on the scene and subsequently **KUEMMERLIN** was transported

to a hospital in Las Vegas. The federal park ranger met **KUEMMERLIN** at the hospital and rather than enforce federal law he used the state implied consent law to obtain blood for alcohol testing. **KUEMMERLIN** was subsequently prosecuted under 36 C.F.R. § 4.23, the federal DUI statute. In addition, the federal park ranger, acting on his own, initiated a state driver's license action against **KUEMMERLIN**.

The State Administrative Law Judge sustained the revocation action against **KUEMMERLIN**. On appeal, the District Court rescinded the revocation, holding,

> That when a person's driving, including the vehicle stop, occurred solely within the Lake Mead National Recreational Area [LMNRA], the federal implied consent controls.[1] *United States v. Love*, 14 F.R.D. 315 (D.Colo. 1992); *U.S. v. Rogers*, 926 F.Supp. 1000 (D.Colo. 1996). *Cf., State, Dept. of Motor Vehicles v. Lovett*, 110 Nev. 473, 874 P.2d 1247 (1994) (State implied consent applicable where person also drove outside of federal property.) *See also, Krahn v. State, Dept. of Motor Vehicles*, 108 Nev. 1015, 842 P.2d 728 (1992) (The Nevada Legislature has not authorized a state driver's license revocation for a conviction of a federal DUI offense.)

---

[1] It is worthy to note that 18 U.S.C. § 3118 and NRS 484.383 are incompatible. The Nevada implied consent authorizes force to obtain a sample if the individual refuses to submit. Under federal law, a person can refuse and no test can be taken.

REASONS FOR GRANTING THE WRIT

I. A FEDERAL PARK RANGER CANNOT ENFORCE STATE LAW IN A FEDERAL PROSECUTION.

The instant Writ involves a serious federal question, "Can a state unilaterally make state law controlling in a federal case?" The Nevada Supreme Court ruled that a federal park ranger has authority to enforce the state implied consent law in a federal prosecution even though jurisdiction lies solely with the United States of America. *See State, Dept. of Motor Vehicles v. Lovett*, 110 Nev. 473, 874 P.2d 1247 (1994).[1] The United States Supreme Court has consistently held that the suspension of an issued driver's license involves state action and constitutional protection. *Bell v. Burson*, 404 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971).

The United States of America and the individual states of the United States are separate and distinct sovereign governments. As a result, the law of one government is not enforceable in another sovereign's jurisdiction. For example, Missouri traffic laws are without force and effect in Nevada. Equally true, state traffic laws are not enforceable in jurisdictions of the United States of America. This is not to say that state laws never become federal law. State criminal laws can be incorporated into federal law under the Assimilative Crimes Act, 18 U.S.C. § 13 (1988) (hereinafter, "the Act"). *See, Lewis v. United States*, 523 U. S. 155, 118 S.Ct. 1135 (1998).

---

[1] Nevada's highest court relied solely on *Lovett, supra*, to decide the instant case.

It is absolutely clear that a state's implied consent law is not incorporated into federal law. *See, e.g., U.S. v. Snyder*, 852 F.2d 471, 474-75 (9th Cir. 1988); *U.S. v. Rowe*, 599 F.2d 1319, 1320 (4th Cir. 1979); *U.S. v. Best*, 573 F.2d 1095, 1100 (9th Cir. 1978); *U.S. v. Love*, 141 F.R.D. 315 (D. Colo. 1992); *United States v. Hollingshead*, 616 F.Supp. 160 (D.C. Haw. 1995). A state's implied consent law is not triggered in a federal prosecution. However, the Nevada Supreme Court has used the "back-door" in an attempt to make Nevada's implied consent law controlling in a federal prosecution, ignoring Congress' intent to the contrary. Again, *see Lovett, supra.*

The Court in *Lovett* sustained the State driver's license revocation on the ground that the federal park ranger was also a state police officer and therefore could enforce the state implied consent law as an agent for the state of Nevada. The *Lovett* court said,

> Thus, we view the dispositive inquiry to be whether Nevada law provides that federal rangers are police officers. If the Nevada statute so provides, federal rangers are authorized to act as agents in seizing and revoking a Nevada driver's license on behalf of the state, specifically the DMV. *Id.* at 476.

This position lacks merit. It cannot be supported in law or logic.

a. The State of Nevada cannot unilaterally make a federal park ranger an agent of the State.

Agency must be proven by a preponderance of the evidence by the party asserting the agency status. *Trump*

v. District Court, 109 Nev. 687, 695, 857 P.2d 740 (1993) ("the burden of proving that an agency relationship exists rests on the party asserting that such a relationship exists.") *See also, Century Ready-Mix v. Campbell County*, 816 P.2d 795, 799 (Wyo. 1991); *Hand Realty Co. v. Meyers*, 672 P.2d 583, 585 (Kan. 1983); *Am. Jur.* 2d Agency § 359 (1986). The record contains no evidence of an agency relationship. In fact, the federal park ranger stated in *Lovett* that he was not an agent for the State of Nevada.

> Q: Okay. In this particular case . . . oh, by the way, are you an agent for the Department of Motor Vehicles?
>
> A: No, sir.
>
> Q: And your [sic] perfectly clear on that point?
>
> A: Yes, I don't work for the State of Nevada.
>
> *Lovett* Hearing; p. 35, ll. 12-18.

An agency status cannot be unilaterally created. *See generally, General Building Contractor's v. Pennsylvania, et al.*, 458 U.S. 375, 102 S.Ct. 2141 (1982). The Court in *Grand Hotel Gift Shop v. Granite St. Ins.*, 108 Nev. 811, 815, 839 P.2d 599, 602 (1992), held,

> . . . the agency relationship is formed when the principal retains the right to control the other's manner of performance.

Clearly, Nevada has no right of control over federal park rangers in a federal prosecution. Therefore, a federal park ranger is not an agent for the State of Nevada.

b. A federal park ranger is not a State police officer.

The Court in *Lovett* held that a federal park ranger, employed and paid solely by the United States of America, is also a state police officer. Therefore, he is an agent for the State, Department of Motor Vehicles and Public Safety and can enforce the State implied consent law.

> The Nevada implied consent statute provides that any driver on a "highway" or other "premises to which the public has access," is deemed to have given consent to an evidentiary test to determine blood alcohol level, which such test is "administered at the direction of a *police officer* having reasonable grounds to believe that the person [was driving while under the influence]." NRS 484.383 (emphasis added). If a driver refuses a test, the requesting officer must revoke the driver's license. NRS 484.383.[4]
>
> "Police officer" is defined, in the "traffic laws" chapter of the Nevada statutes, as *"every officer* authorized to direct or regulate traffic or to make arrests for violations of traffic laws, ordinances or regulations." NRS 484.118 (emphasis added). Park service rangers are authorized by federal regulations to make arrests within their territories for violations of state traffic laws. These regulations provide that "[u]nless specifically addressed by regulations in this chapter, traffic and use of vehicles within a park area are governed by State law. . . . Violating a part of State law is prohibited." 26 CFR § 4.2(a), (b) (1992).

> The DMV argues that because federal rangers are authorized to make arrests for violations of traffic laws, that Regnell falls within the definition of "police officer." The plain meaning of the text supports this construction.

> [4] The police officer must serve an order of revocation of driver's license on the person who failed to submit to an evidentiary test, and must seize the license. NRS 484.385(1). The officer must also transmit the license to the DMV, together with a written certificate that the officer had reasonable grounds to believe the person had been driving while under the influence and refused to submit to a blood alcohol test. NRS 484.385(2)(b).

Lovett at 476-7.

This argument is fallacious. The federal park ranger does not enforce state traffic laws but rather federal law, *i.e.*, state law that has been incorporated into federal law under "the Act." Justice Springer in the dissent makes the point clear.

> A federal officer made the arrest in this case pursuant to federal law. In the park area federal regulations have adopted state traffic laws, and violating state traffic laws "is prohibited" in the park. Thus, violating state traffic laws (by, for example, driving on the wrong side of the road) constitutes violation of federal regulations and subjects the offender to federal sanctions. *Federal enforcement officers are necessarily enforcing federal traffic laws; they are, of course, not empowered by either the state or the federal government to enforce state traffic laws.*
>
> (Emphasis added) *Lovett* at 480

Clearly, a federal park ranger is not a state police officer, thus can not legitimately be deemed an agent for the State.[2] State law cannot be enforced by a federal park ranger in a federal prosecution. Therefore, the instant Writ should be granted.

CONCLUSION

The Nevada Supreme Court's decision violates the sovereignty of the United States by creating an agency relationship where none exists by law. The State of Nevada does not have the authority to bind or control federal agents by subjecting them to State law, which conflicts with federal law and has no force and effect in federal jurisdictions.

Respectfully submitted,

JOHN GLENN WATKINS, ESQ.
Counsel of Record
804 S. Sixth Street
Las Vegas, Nevada 89101
(702) 383-1006

Attorney for the Petitioner

[2] If a federal park ranger could enforce a state implied consent law, he would be subject to liability if he misapplied that law. For example, if the force used to obtain a blood sample was not "reasonable," the police officer could be sued for damages. Under the federal implied consent law, 18 U.S.C. § 3118 (1993), forced blood withdrawals are not authorized.

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA, DEPARTMENT OF MOTOR VEHICLES AND PUBLIC SAFETY, Appellant, vs. KEVIN JOHN KUEMMERLIN, Respondent.	)	No. 32261 [file stamp, dated October 20, 1999]

Appeal from a district court order granting judicial review and reinstating respondent's driving privileges. Eighth Judicial District Court, Clark County; Myron E. Leavitt, Judge.

Reversed and Remanded.

Frankie Sue Del Papa, Attorney General, and Liesl Freedman, Deputy Attorney General, Carson City, for Appellant.

John Glenn Watkins, Las Vegas, for Respondent.

BEFORE MAUPIN, SHEARING and BECKER, JJ.

OPINION

PER CURIAM:

This is an appeal from a district court order granting judicial review and reinstating respondent's driving privileges.[1] Appellant, the Department of Motor Vehicles and Public Safety (DMV), contends the district court erred as a matter of law in failing to follow controlling case law: specifically, *State, Dep't. of Mtr. Vehicles v. Lovett*, 110 Nev. 473, 874 P.2d 1247 (1994). We agree.

On January 19, 1997, federal park ranger Michael Blandford was dispatched to a traffic accident involving a motorcycle on Callville Bay access road in the Lake Mead National Recreation Area (LMNRA). Both individuals on the motorcycle were injured, so a life flight helicopter was called. Respondent Kevin Kuemmerlin, whose eyes were red and watery and whose breath smelled of alcohol, admitted he was the driver of the motorcycle. At the hospital, Ranger Blandford informed Kuemmerlin that Kuemmerlin was required under the Nevada implied consent law to give a blood sample because the accident involved injuries. Upon receipt of test results indicating

---

[1] On August 10, 1999, we issued an order reversing the district court's order and remanding for reinstatement of the agency decision to revoke respondent's driving privileges. On August 23, 1999, appellant moved for publication of our unpublished order as an opinion, and on August 26, 1999, respondent petitioned for rehearing. Cause appearing, we grant the motion to publish our order, and we issue this opinion in place of our order of remand filed August 10, 1999. We deny the petition for rehearing; NRAP 40(c)(1) expressly provides that matters presented in the briefs may not be reargued in a petition for rehearing.

Kuemmerlin's blood alcohol content (0.16%) exceeded the legal limit, Ranger Blandford sent the DMV an officer's certificate of cause, and the DMV revoked Kuemmerlin's driver's license. See NRS 484.385(2). A hearing officer upheld the revocation, but the district court granted Kuemmerlin's petition for judicial review and reversed. The court concluded the Nevada implied consent law did not apply because Kuemmerlin was driving entirely within a federal park, so federal law preempted state law and the DMV lacked jurisdiction.

The district court's conclusions are contrary to this court's decision in *Lovett*, a factually similar case. In that case, a park ranger arrested Lovett for driving under the influence of alcohol in the LMNRA. Although the ranger initiated the stop within park boundaries, Lovett did not stop until he was outside the federal park. Lovett refused to take an evidentiary test, so the ranger completed an officer's certificate of cause, served Lovett with a notice of revocation and as an agent of the DMV seized Lovett's license. A hearing officer upheld the revocation, but the district court granted Lovett's petition for judicial review, reversed the hearing officer and reinstated Lovett's driving privileges. *Lovett*, 110 Nev. at 475, 874 P.2d at 1248-49. The DMV appealed, and we reversed.

In *Lovett*, we rejected the same arguments Kuemmerlin raised at the district court's hearing on his petition for judicial review. And although Kuemmerlin never left the park, whereas Lovett did not stop his vehicle until he was outside the park, our decision in Lovett did not rest on the fact that Lovett drove outside park boundaries. We decided that federal park service rangers are "police officers" within the meaning of the Nevada Statute defining

that term, and that they may therefore be considered agents of the DMV in revoking a Nevada driver's license. *Id.* at 476-77, 874 P.2d at 1249-50. We noted that construing the provision to include federal officers as police officers advances this state's goal of keeping drunk driver's off this state's streets. *Id.* at 477, 874 P.2d at 2150. We also decided that federal regulations governing traffic in federal parks do not preempt state implied consent and license revocation provisions. *Id.* At 478-80, 874 P.2d 1250-51. Thus, the revocation of Lovett's license was proper. *Id.* at 480, 874 P.2d at 1251.

Applying Lovett to this case, we conclude the revocation of Kuemmerlin's license was also proper, and the district court erred in deciding otherwise. Accordingly, we reverse the district court order granting judicial review and reinstating Kuemmerlin's driving privileges and remand to the district court. Upon remand, the district court shall issue an order reinstating the order of the DMV hearing officer upholding the revocation of Kuemmerlin's license

/s/ _____, J.
Maupin

/s/ _____, J.
Shearing

/s/ _____, J.
Becker